



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2009

Ms. Maria Smith
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2009-03654

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 337687.

The North Texas Tollway Authority (the "authority") received a request for three categories of information pertaining to a named former employee of the authority. You state you have released most responsive information to the requestor. You claim that the submitted documents are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, Attachment C contains performance reviews completed by the individual named in the request. These completed evaluations, which we have marked, are subject to section 552.022(a)(1) of the Government Code, and the authority may only withhold them if they are excepted from disclosure under section 552.108 or are confidential under "other law." Although you claim the marked evaluations are excepted under section 552.111 of the Government Code, we note that this section is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, section 552.111 does not make information confidential for purposes of section 552.022. Therefore, the authority may not withhold any portion of the completed evaluations under section 552.111. As this is the only exception you raise for these evaluations, they must be released to the requestor in their entirety.

We now turn to your arguments regarding the remaining information at issue. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Attachment B contains a confidential memorandum between authority attorneys and an authority official, all of whom you have identified. You state that this memorandum was made in furtherance of the rendition of legal services to the authority, and you inform this office that this communication has remained confidential. Based on your representations and our review, we agree that Attachment B constitutes a privileged attorney-client communication. Accordingly, the authority may withhold Attachment B under section 552.107 of the Government Code.

You assert the remaining information at issue within Attachment C is subject to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5.

This office has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document. *See id.* at 2. However, a governmental body may only withhold a draft policymaking document if the final form of this document is intended for public release.

You assert that the submitted charts, labeled "2008 Performance Goals" and "Government Affairs Draft Workplan," should be withheld under section 552.111 and the deliberative process privilege. However, the 2008 Performance Goals chart consists of general administrative information that does not relate to policymaking of the authority. We find that you have failed to demonstrate the applicability of the deliberative process privilege to this document, and it may not be withheld under section 552.111 on this basis. Furthermore, you provide no arguments explaining how the Government Affairs Draft Workplan consists of

a draft version of a policymaking document that has been or will be released to the public in its final form. Thus, the authority may not withhold this document in its entirety as a draft of a policymaking document. However, we agree that two columns of this draft workplan, labeled "Rationale" and "Action Steps," contain the advice, opinions, and recommendations of the authority with regards to policymaking matters. Information within these two columns, which we have marked, may be withheld under section 552.111 of the Government Code.

In summary, the authority may withhold Attachment B under section 552.107 of the Government Code and the information we marked under section 552.111 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 337687

Enc. Submitted documents

c: Requestor
(w/o enclosures)